

1 Jack Cullen, WSBA #7330
2 Bryan Glover, WSBA #51045
3 Andy Morton, WSBA #49467
4 Ella Vincent, WSBA #51351
5 FOSTER PEPPER PLLC
6 1111 Third Avenue, Suite 3000
7 Seattle, Washington 98101
8 Telephone: (206) 447-4689
9 Facsimile: (206) 749-2001
10 Email: jc@foster.com
11 bryan.glover@foster.com
12 andrew.morton@foster.com
13 ella.vincent@foster.com
14 *Attorneys for Debtor Kennewick*
15 *Public Hospital District*

The Honorable Frederick P. Corbit
Chapter: 9

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:

Case No. 17-02025-9

Kennewick Public Hospital District,
Debtor.

NOTICE OF APPEAL AND
STATEMENT OF ELECTION

Part 1. Identify the appellant(s)

1. Name of appellant(s): Kennewick Public Hospital District.
2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

For appeals in a bankruptcy case and not in an adversary proceeding.

- ☐ Plaintiff
☐ Defendant
☐ Other (described): _____

- ☒ Debtor
☐ Creditor
☐ Trustee
☐ Other (describe): _____

NOTICE OF APPEAL AND
STATEMENT OF ELECTION- 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101
PHONE (206) 447-4400 FAX (206) 447-9700

52889949.1

Part 2. Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: Order Granting Philips Medical Capital, LLC Relief from the Automatic Stay [ECF No. 469], including any and all orders merged or incorporated therein.
2. State the date on which the judgment, order, or decree was entered: November 14, 2017.

A copy of the order appealed from is attached hereto.

Part 3. Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, and telephone number of their attorneys (attach additional pages if necessary).

- | | |
|--|--|
| 1. Party: Kennewick Public Hospital District | Attorney: Jack Cullen
Bryan Glover
Andrew H. Morton
Ella Vincent
Foster Pepper PLLC
1111 Third Avenue
Suite 3000
Seattle, WA 98101
(206) 447-4689 |
| 2. Party: Philips Medical Capital, LLC | Attorney: Bruce J. Borrus
Fox Rothschild LLP
1001 Fourth Avenue
Suite 4500
Seattle, WA 98154
(206) 624-3600

Michael A. Sweet
Fox Rothschild LLP
345 California Street
Suite 2200
San Francisco, CA 94104
(415) 364-5540 |

NOTICE OF APPEAL AND
STATEMENT OF ELECTION- 2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101
PHONE (206) 447-4400 FAX (206) 447-9700

52889949.1

Part 4. Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 168(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

☐ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5. Sign below

/s/ Jack Cullen

Date: November 20, 2017

Signature of attorney for appellant(s) or
Appellant(s) if not represented by an attorney

Name, address, and telephone number of
attorney (or appellant(s) if not represented by
attorney):

Jack Cullen, WSBA #7330
Bryan Glover, WSBA #51045
Andrew H. Morton, WSBA #49467
Ella Vincent, WSBA #51351
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
(206) 479-4689

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

NOTICE OF APPEAL AND
STATEMENT OF ELECTION- 3

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3000
SEATTLE, WASHINGTON 98101
PHONE (206) 447-4400 FAX (206) 447-9700

52889949.1

So Ordered.



Frederick P. Corbit

Dated: November 14th, 2017

Frederick P. Corbit
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

In re

Case No. 17-02025-FPC9

KENNEWICK PUBLIC HOSPITAL

**ORDER GRANTING PHILIPS
MEDICAL CAPITAL, LLC
RELIEF FROM THE
AUTOMATIC STAY**

DISTRICT, d/b/a Trios Health,

Debtor.

THIS MATTER came before the Court on two motions brought by Philips Medical Capital, LLC ("Philips") concerning equipment ("Equipment") leased by Philips to debtor Kennewick Public Hospital District ("Debtor"), pursuant to a Master Lease Agreement and 59 Master Lease Schedules (together, the "Leases"): (1) Philips Medical Capital's Motion for Order Compelling the Debtor to Make Post-Petition Lease Payments Pursuant to 11 U.S.C. § 365(d)(5) (ECF No. 144) and (2) Philips Medical Capital's Motion for Order Granting Relief from the Automatic Stay if the Debtor Does Not Provide Adequate Protection (ECF No.

ORDER GRANTING PHILIPS MEDICAL CAPITAL RELIEF FROM
THE AUTOMATIC STAY - 1

1 151) (collectively, the "Philips Motions"). The Court considered the two Philips
2 Motions together.

3 The Court reviewed the files and records herein and was fully advised in the
4 premises.

5 IT IS ORDERED:

6 1. There is cause to grant Philips relief from the automatic stay, because:
7 (1) the Debtor is not providing adequate protection of Philip's interest in the
8 Equipment; and (2) the Debtor is using Philip's Equipment without paying just
9 compensation to Philips;
10

11 2. Philips is granted relief from the automatic stay, pursuant to 11 U.S.C.
12 § 362(d)(1), and Philips may exercise its contractual rights under the Leases to take
13 possession of and to dispose of the Equipment as set forth in the Remedies section
14 (sec. 14) of the Master Lease Agreement between Philips and the Debtor, attached
15 as Exhibit A to the McAllister Decl. (ECF No. 146), provided, however, that so
16 long as this bankruptcy case is pending, Philips shall not collect from the Debtor a
17 judgment for money, except pursuant to the Bankruptcy Code and the Bankruptcy
18 Rules; and

19 3. This Order is stayed until the expiration of 14 days after entry of the
20 Order, pursuant to Bankruptcy Rule 4001(a)(3).

21 The Court has issued Findings of Fact and Conclusions of Law
22 contemporaneously with the entry of this Order.
23
24

25 ///END OF ORDER///
26

ORDER GRANTING PHILIPS MEDICAL CAPITAL RELIEF FROM
THE AUTOMATIC STAY - 2

So Ordered.

*Frederick P. Corbit*

Dated: November 14th, 2017

Frederick P. Corbit
Bankruptcy JudgeUNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

In re

Case No. 17-02025-FPC9

KENNEWICK PUBLIC HOSPITAL
DISTRICT, d/b/a Trios Health,

Debtor.**ORDER GRANTING PHILIPS
MEDICAL CAPITAL, LLC
RELIEF FROM THE
AUTOMATIC STAY**

THIS MATTER came before the Court on two motions brought by Philips Medical Capital, LLC ("Philips") concerning equipment ("Equipment") leased by Philips to debtor Kennewick Public Hospital District ("Debtor"), pursuant to a Master Lease Agreement and 59 Master Lease Schedules (together, the "Leases"): (1) Philips Medical Capital's Motion for Order Compelling the Debtor to Make Post-Petition Lease Payments Pursuant to 11 U.S.C. § 365(d)(5) (ECF No. 144) and (2) Philips Medical Capital's Motion for Order Granting Relief from the Automatic Stay if the Debtor Does Not Provide Adequate Protection (ECF No.

ORDER GRANTING PHILIPS MEDICAL CAPITAL RELIEF FROM
THE AUTOMATIC STAY - 1

1 151) (collectively, the "Philips Motions"). The Court considered the two Philips
2 Motions together.

3 The Court reviewed the files and records herein and was fully advised in the
4 premises.

5 IT IS ORDERED:

6 1. There is cause to grant Philips relief from the automatic stay, because:
7 (1) the Debtor is not providing adequate protection of Philip's interest in the
8 Equipment; and (2) the Debtor is using Philip's Equipment without paying just
9 compensation to Philips;

10 2. Philips is granted relief from the automatic stay, pursuant to 11 U.S.C.
11 § 362(d)(1), and Philips may exercise its contractual rights under the Leases to take
12 possession of and to dispose of the Equipment as set forth in the Remedies section
13 (sec. 14) of the Master Lease Agreement between Philips and the Debtor, attached
14 as Exhibit A to the McAllister Decl. (ECF No. 146), provided, however, that so
15 long as this bankruptcy case is pending, Philips shall not collect from the Debtor a
16 judgment for money, except pursuant to the Bankruptcy Code and the Bankruptcy
17 Rules; and

18 3. This Order is stayed until the expiration of 14 days after entry of the
19 Order, pursuant to Bankruptcy Rule 4001(a)(3).
20

21 The Court has issued Findings of Fact and Conclusions of Law
22 contemporaneously with the entry of this Order.
23

24
25 ///END OF ORDER///
26

Notice Recipients

District/Off: 0980-2
Case: 17-02025-FPC9

User: wendyi
Form ID: pdf002

Date Created: 11/14/2017
Total: 9

Recipients of Notice of Electronic Filing:

atyBruce J Borrus bborrus@foxrothschild.com
atyBruce W Leaverton leavertonb@lanepowell.com
atyDouglas P Cushing doug.cushing@jordanramis.com
atyJack Cullen jc@foster.com
atyKatriana L Samiljan
ksamiljan@bskd.com, andrew.silfen@arentfox.com, george.angelich@arentfox.com, mark.angelov@arentfox.com, jordana.renert@arentfox.com, Phill
atyRagan L Powers raganpowers@dwt.com

Recipients submitted to the BNC (Bankruptcy Noticing Center):

Michael Sweet	Fox Rothschild LP	345 California Street, Suite 2200	San Francisco, CA 94104-2734
Debra Dandeneau	Baker & McKenzie LLP	452 Fifth Avenue	New York, NY 10018
Jeffrey C Krause	Gibson Dunn & Crutcher LLP	333 South Grand Avenue	Los Angeles, CA
90071-3197			

TOTAL: 3

Bruce J. Borrus, WSBA No. 11751
 FOX ROTHSCHILD LLP
 1001 Fourth Avenue, Suite 4500
 Seattle, WA 98154-1192
 (206) 624-3600
bborrus@foxrothschild.com

Honorable Frederick P. Corbit
 Hearing Date: September 6, 2017
 Hearing Time: 2:00 p.m.
 Response Date: August 30, 2017
 Chapter 9

Attorney for Philips Medical Capital
 LLC

UNITED STATES BANKRUPTCY COURT
 FOR THE EASTERN DISTRICT OF WASHINGTON

In re

Case No. 17-02025-FPC9

Kennewick Public Hospital District,

 Debtor.

**PHILIPS MEDICAL CAPITAL'S
 MOTION FOR ORDER
 COMPELLING THE DEBTOR TO
 MAKE POST-PETITION LEASE
 PAYMENTS PURSUANT TO
 11 U.S.C. § 365(d)(5)**

Philips Medical Capital LLC ("PMC") moves for an order compelling the Kennewick Public Hospital District ("KPHD" or "Debtor") to make post-petition payments pursuant to the Master Lease Agreement (attached to the McAllister Decl. as Exhibit A) and forty-four of the fifty-nine Master Lease Schedules (attached to the McAllister Decl. as Exhibits B-1 through B-59). The Motion is made in accordance with Bankruptcy Code section 365(d)(5) and Local Bankruptcy Rule 6006-1. This Motion is supported by the Declaration of Charles McAllister and the Declaration of Robert Nelson Herb.

I. JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C.

MOTION FOR ORDER COMPELLING DEBTOR TO MAKE POST-
 PETITION PAYMENTS... - (No. 17-02025) - 1

FOX ROTHSCHILD LLP
 1001 Fourth Avenue, Suite 4500
 Seattle, Washington 98154-1192
 206.624.3600

029725\00048\50284506.v3

§ 157(b)(2). Venue of this chapter 9 case and the Motion are proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. INTRODUCTION

PMC leases diagnostic imaging equipment, patient monitoring equipment, and clinical IT systems to hospitals and other medical facilities

PMC and KPHD are parties to a Master Lease Agreement, dated December 7, 2011. KPHD and PMC entered into a number of Master Lease Schedules (“Schedules”), each of which incorporates the terms of the Master Lease Agreement but each of which constitutes an independent lease.

At present, there are fifty-nine Schedules outstanding between PMC and KPHD. Of the fifty-nine schedules, fifteen are security interest transactions as described by section 1-203 of the Uniform Commercial Code (“UCC”). These fifteen Schedules (the “Security Interest Transactions”) are not true leases, because they contain a provision permitting KPHD to purchase the equipment at the expiration of the lease term for \$1.00.¹ This Motion addresses the other forty-four Schedules (collectively, the “True Leases”) that contain a provision permitting KPHD to purchase the equipment at the end of the lease term “for a purchase price equal to the fair market value of the System as of the Term Expiration Date.”²

Attached as Exhibit C to the McAllister Decl. is a list of all of the Schedules, both the fifteen Security Interest Transactions and the forty-four True Leases. The total amount currently due each month on the forty-four True Leases is \$196,150.08. KPHD has not made any payments on the Schedules since March 2017.

¹ The fifteen Security Interest Transactions are Schedule Nos. 4, 7, 19, 23, 27, 33, 40, 56, 57, 58, 60, 62, 63, 67, and 74.

² The forty-four True Leases are Schedule Nos. 1, 5, 11, 12, 15, 20, 24, 25, 26, 30, 32, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 59, 61, 64, 65, 66, 69, 71, 72, 73, 75, 76, and 77.

III. SUMMARY OF ARGUMENT

PMC seeks an order compelling the Debtor to make timely monthly payments on the forty-four True Leases commencing with the payments due on September 1, 2017. Bankruptcy Code § 365(d)(5) requires the trustee to timely perform all of the obligations of the debtor under an unexpired lease of personal property “first arising from or after 60 days after the order for relief” until the lease is assumed or rejected. Section 365 applies in chapter 9 cases. 11 U.S.C. § 901. In a chapter 9 case, “trustee” means “debtor.” 11 U.S.C. § 902(5). Section 365(d)(5) requires KPHD to make lease payments on the first day of each month beginning with the payments due on September 1, 2017, 62 days after the date of the order for relief.

PMC anticipates that the Debtor will argue that it can continue to use the PMC equipment without making payments by alleging that the True Leases are disguised security agreements. The Debtor will be unable to sustain its burden of proof on this issue for three reasons:

1. The True Leases all provide in paragraph 8 that KPHD has the option to purchase the leased equipment at the expiration of the lease by paying a purchase price equal to the equipment’s fair market value;
2. The useful life of the equipment exceeds the lease term; and
3. At the end of the lease term, the equipment has significant residual value to the lessor.

IV. ARGUMENT

A. The Debtor must pay post-petition rent due after the 60th day, and the Debtor must provide adequate protection.

Section 365(d)(5) of the Bankruptcy Code provides that the trustee or debtor-in-possession “shall timely perform all of the obligations of the

1 debtor . . . first arising from or after 60 days after the order for relief in a case
2 under chapter 11 of this title under an unexpired lease of personal property . . .
3 until such lease is assumed or rejected notwithstanding Section 503(b)(1) of this
4 title.” 11 U.S.C. § 365(d)(5). Subsection 365(d)(5), like all of the subsections of
5 section 365, applies in chapter 9 cases. 11 U.S.C. § 901(a).

6 Judge Overstreet discussed section 365(d)(5) [then codified at § 365(d)(10)]
7 in the *Ernst* case.

8 Section 365(d)(10) was an attempt to give personal
9 property lessors some of the protections accorded real
10 property lessors under Section 365(d)(3). Pursuant to
11 subsection (10) [now subsection (5)], the debtor must
12 commence timely payments due under a personal
13 property lease to the lessor 60 days after the order for
14 relief is entered in the case. The court may order
15 otherwise, but this must be upon the motion of the
16 debtor, not the lessor. The intent of this new subsection
17 was to retain the debtor's breathing period to make an
18 informed decision about assumption or rejection of
19 personal property leases, while assuring the lessor that
20 after 60 days it will receive its lease payments without
21 having to demonstrate actual benefit to the estate.

22 *In re Ernst Home Center, Inc.*, 209 B.R. 955, 965 (Bankr. W.D. WA 1997).

23 Monthly lease payments are also necessary for the Debtor to provide
24 adequate protection of PMC's interest in the leased equipment. “Courts have
25 generally held that a lessor's adequate protection rights in the case of personal
26 property are defined by 11 U.S.C. § 365(d)(10).” *In re Rebel Rents, Inc.*, 291 B.R.
520, 532 (Bankr. C.D. Cal. 2003).

Section 365(d)(5) requires the Debtor to make timely payments on the first
day of each month after sixty days from the date of the order for relief. PMC
requests that this Court enforce section 365(d)(5) and issue an order compelling the
Debtor to make timely monthly payments to PMC, beginning with the payments

1 due on September 1, 2017. The total of the current monthly payments due on the
2 forty-four True Leases is \$196,150.08.³

3 **B. The Forty-four Lease Schedules Are True Leases.**

- 4 1. The Debtor has the burden of proving that the True Leases are
5 disguised security agreements.

6 Cases addressing whether a transaction is a true lease or a disguised security
7 agreement uniformly hold that the party asking the court to characterize a lease as
8 something other than what it purports to be has the burden of proof. *E.g., In re Uni*
9 *Imaging Holdings, LLC*, 423 B.R. 406, 414 (Bankr. N.D. NY 2010); *In re Gateway*
10 *Ethanol, LLC*, 415 B.R. 486, 498 (Bankr. D. Kansas 2009); *In re QDS*
11 *Components, Inc.*, 292 B.R. 313, 321-22 (Bankr. S.D. Ohio 2002).

12 Each of the forty-four True Leases states that it is a lease. For example,
13 Master Lease Schedule No. 01 states in the first sentence: "This Master Lease
14 Schedule No. 1 ("Lease Schedule"), dated as of December 7, 2011, constitutes an
15 independent lease incorporating the terms and conditions of the Master Lease
16 Agreement ("Agreement"), dated as of December 7, 2011 by and between
17 PHILIPS MEDICAL CAPITAL, LLC ("Lessor") and Lessee." McAllister Decl.
18 Ex. B-1. A similar sentence begins each of the Master Lease Schedules.
19 McAllister Decl. Exs. B-1 through B-59.

- 20 2. Each of the forty-four True Leases is a true lease under UCC § 1-203.

21 *In re Uni Imaging Holdings, LLC*, 423 B.R. 406 (Bankr. N.D. NY 2010)
22 addressed the question whether a PMC lease for magnetic resonance imaging
23 equipment is a secured transaction or a true lease. *Uni Imaging Holdings* ruled that
24 the PMC lease was a true lease.

25
26 ³ The monthly payments due on several of the Schedules will increase in coming months. McAllister Decl. Ex. C.

1 The court applied Pennsylvania law, specifically the Uniform Commercial
2 Code provision titled Determination of Lease or Security Interest. The statute at
3 the time of the *Uni Imaging Holdings* case, 13 Pa. C.S.A. § 1201(5), is
4 substantially similar to the current law, 13 Pa. C.S.A. 1203, which is substantively
5 identical to UCC § 1-203.

6 *Uni Imaging Holdings*, like other courts addressing the question whether a
7 transaction is a lease or a security interest under UCC § 1-203, first applied what is
8 often called the “Bright-Line Test.” 423 B.R. at 498. Under the Bright Line Test
9 the court compares the specific provisions of the lease to statutory criteria set forth
10 in UCC § 1-203(b).

11 UCC § 1-203(b)(4) directs attention to purchase options in the lease. Each
12 of the True Leases contains a purchase option that permits KPHD, at the end of the
13 lease term, to purchase the equipment for a price equal to the fair market value of
14 the equipment as of the Lease Termination Date. The fair market value of the
15 PMC equipment at the end of the lease term is not nominal—it is substantial. The
16 fair market value of the equipment is set forth in Exhibit 1 of the Declaration of
17 Robert Nelson Herb (“Herb Decl.”)

18 The Bright Line Test does not conclude the inquiry. If the Debtor cannot
19 prove that the lease is a security agreement under the Bright Line Test, the court
20 examines whether the lessor retains “a meaningful residual interest at the end of
21 the lease term.” *Uni Imaging Holdings, LLC*, 423 B.R. at 414.

22 “The hallmark of a lease is that it grants the lessee the
23 right to use property for a period less than its economic
24 life with the concomitant obligation to return the property
25 to the lessor while it retains some substantial economic
26 life.” (quoting *QDS Components*, 292 B.R. at 322). In
other words, “the lessor retains an economically
meaningful residual interest in the leased property.”
(quoting *QDS Components*, 292 B.R. at 331.)

1 *Uni Imaging Holdings*, 423 B.R. at 416 quoting *Gateway Ethanol*, 415 B.R. at 499.

2 *Duke Energy Royal, LLC v. Pillowtex Corporation (In re Pillowtex, Inc.)*,
3 349 F.3d 711 (3rd Cir. 2003), is an example of a case in which the debtor failed to
4 sustain its burden of proof under the Bright Line Test but ultimately prevailed by
5 showing that the lessor had no “meaningful residual interest” at the expiration of
6 the lease term. As will be observed in the paragraphs that follows, the lease and
7 the facts in *Pillowtex* are both materially different from terms of the PMC True
8 Leases and the facts in this case.

9 *Pillowtex* began its legal analysis by noting that whether a transaction is a
10 true lease or a security agreement is a question of state law, and that the burden of
11 proof is on the party seeking to characterize the transaction as a secured financing
12 arrangement rather than a lease. 349 F.3d at 716. *Pillowtex* then applied the
13 Bright Line Test and concluded that the transaction was not a disguised security
14 agreement under the Bright Line Test. 349 F.3d at 718. *Pillowtex* then went on to
15 consider the economic realities of the transaction. *Pillowtex* cited *Edison Bros.* for
16 the proposition that in a true lease the lessor will have “a substantial residual
17 value” at the end of the lease term. 349 F.3d at 720 citing *In re Edison Bros.*
18 *Stores, Inc.*, 207 B.R. 801, 818 (Bankr. D. Del. 1997). Other courts use the phrases
19 “meaningful reversionary interest” or “meaningful economic residual.” E.g., *Uni*
20 *Imaging Holdings*, 423 B.R. at 418. *Pillowtex* concluded that the lessor did not
21 have a meaningful residual interest, because under its agreement the lessor was
22 responsible for all costs and expenses in removing its lighting fixture equipment
23 and for replacing the lessee’s lighting fixture equipment with other equipment
24 similar to the equipment that was previously in place. 329 F.3d at 714. In
25 addition, the uncontroverted evidence established “that there was little (if any)
26 market value for used lighting fixtures.” 329 F.3d at 720. *Pillowtex* stated that “it

1 would have made no economic sense for [the lessor] to spend large amounts of
2 money to reclaim the fixtures, especially in the face of poor resale prospects.” 349
3 F.3d at 721. *Pillowtex* concluded that the cost of retrieving the lighting fixtures
4 and their poor market value rendered the lessor’s residual interest negligible. 349
5 F.3d at 723.

6 The PMC True Leases are distinguishable from the leases at issue in
7 *Pillowtex* in three significant respects. First, in *Pillowtex* the lessor was
8 responsible for replacing the lessee’s lighting fixtures if the lessor removed the
9 lighting fixtures at the end of the lease. The PMC Master Lease does not require
10 PMC to replace KPHD’s equipment. Second, in *Pillowtex*, the lessor was
11 responsible for the costs of removing the lighting fixtures and of repairing
12 damages. The PMC Master Lease requires KPHD “at its sole expense” to uninstall
13 the equipment, box it, and ship it to a location designated by PMC. Third, in
14 *Pillowtex*, the used lighting fixtures had “little (if any) market value.” 349 F.3d at
15 720. The medical equipment described in each of the forty-four True Leases
16 retains significant resale value at the end of the lease term. Herb Decl.

17 Each of the forty-four True Leases is a true lease under UCC § 1-203 for
18 three reasons.

- 19 1. If the Debtor wants to purchase the leased equipment at the
20 expiration of the lease term, the Debtor must pay a price equal
21 to the fair market value of the equipment.
 - 22 2. The economic life of the equipment is longer than the term of
23 the lease.
 - 24 3. At the expiration of the lease, the lessor retains significant
25 residual value.
- 26

1 **C. The *Elder-Beerman Stores* provisional remedy is a balanced model.**

2 The Debtor has made no payments to PMC since March 2017, and it is in
3 the Debtor's interest to continue to use the PMC equipment without paying for it.
4 PMC anticipates that the Debtor will argue that it should not be compelled to make
5 any payments to PMC until the Court rules on the true lease/security interest issue.

6 *In re Elder-Beerman Stores Corp.*, 201 B.R. 759 (Bankr. S.D. Ohio 1996),
7 provides a model of adequate protection during the period in which the parties
8 were litigating. The bank filed a motion to compel payment of post-petition lease
9 obligations. In response, the debtor commenced an adversary proceeding by filing
10 a Complaint for Declaratory Judgment seeking a ruling that the bank's Master
11 Lease Agreement was not a true lease but a security agreement.

12 *Elder-Beerman Stores* addresses the question "whether a debtor may avoid
13 the obligation under 11 U.S.C. § 365(d)(10) [now § 365(d)(5)] to 'timely perform
14 all of the obligations . . . first arising from or after 60 days after the order for relief
15 . . . under an unexpired lease of personal property' while awaiting a court
16 determination of whether the transactions in question are leases or security
17 agreements." 201 B.R. at 761. The court decided the question in favor of the
18 lessor.

19 [W]here the debtor is faced with agreements
20 unambiguously titled as "leases," the debtor may not
21 circumvent the requirements of § 365(d)(10) while
22 challenging the nature of the agreements.

23 201 B.R. at 764.

24 The parties in *Elder-Beerman Stores* reached an agreement that balanced
25 their interests. They agreed that the debtor would make its payments into an
26 escrow account at a separate financial institution. The agreement protected the
debtor in the event that the court later decided that the agreements were not true

1 leases, and the agreement protected the bank in the event that the court later
2 decided that the agreements were true leases but the debtor could not pay the post-
3 petition rents because it was administratively insolvent. 201 B.R. at 765.

4 *Elder-Beerman Stores* concluded:

5 It is therefore the conclusion of the court that the Debtors
6 must perform all obligations under § 365(d)(10) until
7 given leave by the court to do otherwise. Thus until the
8 resolution of the underlying issues in the pending
9 adversary proceeding, the Debtors are ordered to make
10 all payments that have come or will come due after the
11 expiration of the 60-day post-petition abeyance period.

12 The Debtors are directed to establish a separate interest-
13 bearing escrow account at a financial institution other
14 than Star Bank, with a provision requiring the payment of
15 the account funds in conformity with this court's
16 resolution of *The Elder-Beerman Stores Corp. v. Star*
17 *Bank, N.A.*, Adversary Proceeding 96-3070. The
18 contents of this account are to be considered the property
19 of Star Bank, subject only to a decision adverse to Star
20 Bank in the above-mentioned adversary proceeding.

21 201 B.R. at 765.

22 If this Court is not yet ready to rule that the True Leases are true leases,
23 PMC requests that the Court enter an order substantially similar to the order in
24 *Elder-Beerman Stores*, requiring the Debtor to deposit its monthly lease payments
25 into an escrow account pending a final decision.

26 **V. RELIEF REQUESTED**

PMC respectfully requests that the Court enter an order, pursuant to 11
U.S.C. § 365(d)(5), compelling the Debtor to make timely monthly payments,
beginning with the payments due on September 1, 2017, under the forty-four True
Leases until the True Leases are assumed or rejected.

1 DATED this 11th day of August, 2017.

2
3 FOX ROTHSCCHILD LLP

4 By /s/ [Signature]
5 Bruce J. Borrus, WSBA No. 11751
6 Attorneys for Philips Medical
7 Capital LLC
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MOTION FOR ORDER COMPELLING DEBTOR TO MAKE POST-
PETITION PAYMENTS... - (No. 17-02025) - 11

FOX ROTHSCCHILD LLP
1001 Fourth Avenue, Suite 4500
Seattle, Washington 98154-1192
206.624.3600

029725\00048\50284506.v3

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

In re

Kennewick Public Hospital District,

Debtor.

Case No. 17-02025-FPC9

**[PROPOSED] ORDER
GRANTING PHILIPS
MEDICAL CAPITAL'S
MOTION FOR ORDER
COMPELLING THE DEBTOR
TO MAKE POST-PETITION
PAYMENTS PURSUANT TO
11 U.S.C. § 365(d)(5)**

THIS MATTER came before the Court on Philips Medical Capital's Motion for Order Compelling the Debtor to Make Post-Petition Payments Pursuant to 11 U.S.C. § 365(d)(5) ("Motion"). The Court considered the Motion and pleadings filed in response to the Motion, if any. Being fully advised in the premises.

The Court hereby ORDERS that the Motion is GRANTED, and Kennewick Public Hospital District is ordered to make timely monthly payments, beginning with

[PROPOSED] ORDER GRANTING PHILIPS MEDICAL CAPITAL'S
MOTION COMPELLING DEBTOR TO MAKE POST-PETITION
PAYMENTS (No. 17-02025) - 1

FOX ROTHSCHILD LLP
1001 Fourth Avenue, Suite 4500
Seattle, Washington 98154-1192
206.624.3600

1 the payments due on September 1, 2017, under the forty-four True Leases (as defined
2 in the Motion) until the True Leases are assumed or rejected.

3
4
5 ///END OF ORDER///

6
7 PRESENTED BY:

8 FOX ROTHSCHILD LLP

9
10 By: /s/ Bruce J. Borrus

11 Bruce J. Borrus, WSBA #11751

12 Attorneys for Pacific Medical Capital LLC
13
14
15
16
17
18
19
20
21
22
23
24
25
26

[PROPOSED] ORDER GRANTING PHILIPS MEDICAL CAPITAL'S
MOTION COMPELLING DEBTOR TO MAKE POST-PETITION
PAYMENTS (No. 17-02025) - 2

FOX ROTHSCHILD LLP
1001 Fourth Avenue, Suite 4500
Seattle, Washington 98154-1192
206.624.3600